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In the Supreme Court of the United States

OCTOBER TERM, 1956

GILBERT GREEN AND HENRY WINSTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 897

GILBERT GREEN AND HENRY WINSTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 25-31) has not yet been reported. The opinion of the District Court in the *Green* case (Pet. 32-38) appears at 140 F. Supp. 117.

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1957. On February 21, 1957, an order was entered by Mr. Justice Harlan extending the time for filing a petition for certiorari to April 12, 1957. The petition was filed on April 9, 1957.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether the trial court had the power to sentence petitioners to terms in excess of one year for criminal contempt.

2. Whether the evidence was sufficient to sustain the findings that petitioners knowingly disobeyed an order of the District Court.

3. Whether petitioners' disobedience of the order of the District Court, which required them to surrender from enlargement on bail after affirmance of their convictions, constituted contempt.

4. Whether the trial court abused its discretion in sentencing petitioners to imprisonment for three years where petitioners had flouted the order of the District Court for a period of nearly five years.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution of the United States, insofar as relied upon, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *.

Amendment VI provides

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *.

18 U. S. C. § 401:

> A court of the United States shall have power

to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

* * * * *

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. (June 25, 1948, ch. 645, Sec. 1, 62 Stat. 701.)

18 U. S. C. § 402:

* * * * *

This section shall not be construed to relate to contempts * * * committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law. (June 25, 1948, ch. 645, Sec. 1, 62 Stat. 701; May 24, 1949, ch. 139, Sec. 8 (c), 63 Stat. 90.)

Rule 7, Federal Rules of Criminal Procedure:

(a) * * * An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment, or, if indictment is waived, it may be prosecuted by information. * * *

Rule 42, Federal Rules of Criminal Procedure:

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was commited in the actual presence of the court. * * *

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in sub-

division (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides.

* * *

STATEMENT

These proceedings were initiated in the District Court for the Southern District of New York, upon application of the United States Attorney, by an order requiring petitioners to show cause why they should not be adjudged guilty of contempt of the court for disobedience of and resistance to an order of that court. 18 U. S. C. 401 (3) (*supra*, pp. 2-3); Rule 42, Federal Rules of Criminal Procedure (*supra*, pp. 3-4). Prior to trial, petitioners were served with "Specifications of Criminal Contempt." Trial was had on March 12 and March 26, 1956, before Judge Dawson, who found the petitioners guilty and sentenced each to a term of three years (G. Tr. 87; W. Tr. 64).[1] On appeal, in a unanimous opinion by Judge

[1] "G. Tr." and "W. Tr." refer to the typewritten transcript from the court below in the *Green* case and the *Winston* case, respectively. Neither record has been printed. "G. Ex." designates an exhibit in the *Green* case and "W. Ex." an exhibit in the *Winston* case.

Hand, the judgments of conviction were affirmed by the Court of Appeals for the Second Circuit.

The pertinent facts are as follows:

In 1949, petitioners, together with nine other defendants, were convicted in the District Court of violation of Sections 2 and 3 of the Smith Act (18 U. S. C. 2385) and were each sentenced to five years imprisonment and a fine of $10,000. (G. Tr. 98; W. Tr. 69). Pending appeal, petitioners were enlarged on bail bond. The recognizance under which they had been released was conditioned *inter alia* upon their surrender "in execution of the judgment and sentence appealed from upon such day as the District Court of the United States for the Southern District of New York may direct, if the judgment and sentence appealed from shall be affirmed" (G. Tr. 11; W. Tr. 13-14). Petitioners' convictions were affirmed by this Court, after affirmance by the Second Circuit, on June 4, 1951. *Dennis* v. *United States*, 341 U. S. 494.

On June 28, 1951, Mr. Harry Sacher, on behalf of petitioners, accepted service of a proposed order on mandate, requiring petitioners personally to surrender on July 2, 1951 to the United States Marshal for execution of their sentences, together with notice that such order would be presented for settlement and signature on Monday, July 2, 1951, at 10:00 a. m. (G. Tr. 12; G. Ex. 5; W. Tr. 14-15; W. Ex. 1).

On the following day, June 29, 1951, Mr. Sacher, on behalf of petitioners and the other *Dennis* defendants, asked the United States Attorney to postpone

the surrender until after July 4, 1951, "to allow these men to spend the last holiday, which would be available to them for some years * * * with their wives and children * * *" (G. Tr. 18). This request was denied. Later that afternoon, Mr. Sacher appeared before Judge Ryan in connection with his motion relating to suspension or staying of the sentences imposed on all of the defendants in the *Dennis* case. All motions were continued until Monday, July 2, 1951, Mr. Sacher stating to the court: "You have my word that all of these defendants will be here at that time." When questioned by Judge Ryan (on July 3) concerning this statement, Mr. Sacher agreed that it had reference to the eleven defendants, including petitioners (G. Tr. 14; W. Tr. 17), and stated: "[T]he only basis on which I could make my statement or promise to the Court was the promise of my clients and the others to appear" (G. Tr. 17; W. Tr. 19).

After the District Court proceedings on June 29, 1951, Mr. Sacher went to Communist Party Headquarters, 35 East 12th Street, where he met with the *Dennis* defendants (G. Tr. 15; W. Tr. 18), and notified them that they would have to appear in court on Monday, July 2. Respecting this meeting, Mr. Sacher informed the court as follows (G. Tr. 15-16; W. Tr. 18-19):

> The COURT. Did you tell them at that time that their presence was required in court yesterday morning?
>
> Mr. SACHER. Definitely, * * * after I had been here on Friday, your Honor, and had made

these motions, [I] advised that they all should be present, and I was assured they would be.

The COURT. By them?

Mr. SACHER. Yes, by all of the defendants.

The COURT. That is, that all defendants would be here?

Mr. SACHER. That's right.

Petitioners did not appear on July 2, at which time the proposed order on mandate, requiring their surrender to the United States Marshal, was signed by Judge Ryan (G. Tr. 12; W. Tr. 14). Attempts thereafter to execute a bench warrant for petitioners were without success (G. Tr. 20-21; W. Tr. 25-27). Petitioner Green did not surrender until February 27, 1956, and Winston not until March 5, 1956 (G. Tr. 22; W. Tr. 25).

These proceedings were then instituted against petitioners charging each with knowingly and deliberately disobeying and resisting the July 2, 1951 order requiring their surrender (G. Tr. 88-93, 98-108; W. Tr. 65-79). In finding each petitioner guilty, the court concluded that the evidence was sufficient to establish that petitioner deliberately and knowingly disobeyed the order requiring his surrender (G. Tr. 44-45; W. Tr. 39).

ARGUMENT

The issues here raised by petitioners Green and Winston regarding the scope of the contempt power and the sufficiency of the evidence are substantially the same as those advanced by petitioners' co-fugitives Gus Hall in *United States* v. *Hall*, 198 F. 2d 726 (C. A. 2), in which this Court declined review,

345 U. S. 905, and Robert Thompson in *United States* v. *Thompson*, 214 F. 2d 545 (C. A. 2), in which this Court also declined review, 348 U. S. 841.[1] In addition, petitioners claim that the trial court was without power to sentence them to terms in excess of one year.

All of these cases involve convictions for contempt for a wilful failure to obey the same order of Judge Ryan to appear for surrender on July 2, 1951, following this Court's affirmance of the four defendants' (Hall, Thompson, Green, and Winston) Smith Act convictions in *Dennis* v. *United States*, 341 U. S. 494. The facts relating to each, while not identical, follow the same general pattern. It is submitted that there is no more warrant for review in this case than existed in the *Hall* and *Thompson* cases.

1. Petitioners maintain that the District Court exceeded its power in imposing a sentence of more than one year for contempt. This contention is at odds, not only with the plain wording of 18 U. S. C. 401, but also with long-standing authority.

Section 401 of 18 U. S. C. provides that:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * * * *

[1] In fact, in the court below, petitioners limited their brief and argument to the question of the validity of the three-year sentences, conceding that the decisions in *Hall* and *Thompson* foreclosed that court's consideration of petitioners' other contentions (Pet. 5, 26).

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command.

In terms, therefore, the statute in no way limits the length of sentence which may be imposed upon a contemnor. Indeed, the very reverse of such a limitation is suggested by the phrase "at its discretion." This phrase, as Judge Hand pointed out in the opinion below (Pet. 30), means that "The term of imprisonment is to be as much in the court's discretion as the fine." Such discretion, of course, cannot be exercised arbitrarily. See *United States* v. *Mine Workers*, 330 U. S. 258. But, apart from that exception, it is for the trial court to determine the proper punishment for criminal contempts.

At least four decisions by courts of appeals are in accord; there is no decision to the contrary. In *Warring* v. *Huff*, 122 F. 2d 641, 642 (C. A. D. C.), certiorari denied, 314 U. S. 678, the court held that "the contempt statute sets no maximum, not even an indefinite one such as life; the maximum is the non-arbitrary discretion of the trial judge." Likewise, in *United States* v. *Lederer*, 140 F. 2d 136, 139 (C. A. 7), certiorari denied, 322 U. S. 734, the court ruled that punishment in a contempt proceeding "rests solely in the sound discretion of the court, subject only to the Constitutional provision against cruel and unusual punishment." In both the *Warring* and *Lederer* cases, the sentence also exceeded one year.

In *Creekmore* v. *United States*, 237 Fed. 743 (C. A. 8), certiorari denied, 242 U. S. 646, the court rejected the very argument now being urged by petitioners. In upholding a sentence of a year and a day

and ruling that a statute almost identical to Section 401 "vest[ed] almost unlimited discretion in the court as to the character and extent of punishment" (p. 748), the court remarked that "* * * we must either assume that a defendant may be sentenced to prison for more than a year or that a statute which provides that the defendant may be punished by imprisonment at the discretion of the court in some mysterious way means that the discretion is limited to one year, without that thought being expressed." 237 Fed. at 754. See also *Conley* v. *United States*, 59 F. 2d 929, 936 (C. A. 8) (sentence of two years) ("The extent of the punishment, when not grossly excessive, lies within the discretion of the court").

There are numerous other cases in which sentences of more than a year were imposed. *E. g.: Hill* v. *United States*, 300 U. S. 105 (sentence of two years); *United States* v. *Hall*, 198 F. 2d 726 (C. A. 2), certiorari denied, 345 U. S. 905 (sentence of three years); *United States* v. *Thompson*, 214 F. 2d 545 (C. A. 2), certiorari denied, 348 U. S. 841 (sentence of four years); *Nilva* v. *United States*, 352 U. S. 385 (sentence of one year and one day); *Lopiparo* v. *United States*, 216 F. 2d 87 (C. A. 8), certiorari denied, 348 U. S. 916 (sentence of eighteen months); *Yates* v. *United States*, 227 F. 2d 848 (C. A. 9) (sentence of three years); *United States* v. *Miranda*, Docket No. C 144-167 (S. D. N. Y.) (sentence of three years); *United States* v. *Pontillo*, Docket No. C 151-113 (S. D. N. Y. (sentence of four years).

In an attempt to impose a one-year limitation on Section 401, petitioners place principal reliance on

Section 24 of the Clayton Anti-trust Act of 1914 (38 Stat. 739). Section 24 provided that contempts may be punished "in conformity to the usages at law and in equity now prevailing". Petitioners maintain that such usages preclude imposition of a sentence of more than one year. However, the statute governing petitioners' case is not Section 24 of the Clayton Act, but rather 18 U. S. C. 402, which replaced Section 24 when the latter was repealed on June 25, 1948. Section 402 states only that a contemnor may be punished "in conformity to the prevailing usages at law". It is evident from the cases that the "prevailing usages at law", regardless of what they may have been prior to 1914, as of 1948 were that a contemnor may be sentenced to more than one year's imprisonment. *Warring* v. *Huff*, *supra*; *United States* v. *Lederer*, *supra*; *Creekmore* v. *United States*, *supra*; *Conley* v. *United States*, *supra*; *Hill* v. *United States*, *supra*.

Nevertheless, even if the present case were governed by Section 24 of the Clayton Act, the "usages" prevailing in 1914 were such that a contempt could be punished by more than a year's imprisonment. It was decided in *Creekmore* v. *United States*, *supra*, less than two years after the passage of the Clayton Act, that a sentence for a year and a day was valid. The court, though it made no reference to the Clayton Act, must certainly have considered such a sentence within the "usages" prevailing in that era. Similarly, in *Hill* v. *United States*, *supra*, where Section 24 of the Clayton Act was directly involved and where the validity of a two-year sentence was at-

tacked as excessive, this Court unanimously sustained the sentence without any intimation that Section 24 imposes a one-year limitation. The short answer to petitioners' contention is that the "usages" clause of Section 24 and 18 U. S. C. 402—to the extent it has any bearing on the amount of punishment imposed for criminal contempts—does no more than adopt the well-established principle that "the maximum is the non-arbitrary discretion of the trial judge." *Wiering* v. *Huff*, *supra*.[5]

Petitioners seek to support their construction of the "usages" clause on the further ground that such a construction would avoid adjudication of a constitutional question—namely, whether criminal contempt, if punishable by imprisonment for more than a year, is an "infamous crime" within the meaning of the Fifth Amendment and hence must be prosecuted by indictment. This argument, however, ignores the historically unique status of criminal contempts. Contempts have never been classed as either "felonies" or "misdemeanors" in this country, but rather have always been regarded as *sui generis*.

[5] Petitioner's construction of the "usages" clause, it should be noted, is presumably applicable not only to the power to punish by imprisonment but also to the power to punish by fine. If so, and if such a construction were adopted, it would appear to follow that no fine for criminal contempt could exceed the maximum imposed on October 15, 1914. See, in this respect, *United States* v. *Mine Workers*, 330 U. S. 258, sustaining (as modified) an unprecedented fine of $700,000. None of the five opinions in that case, including the three dissents, gives any indication that the "usages" clause imposes a fixed limitation on punishment for criminal contempt.

Bessette v. *W. B. Conkey Co.*, 194 U. S. 324, 326; *Warring* v. *Huff*, *supra*.[4]

A contemnor has never enjoyed the full bundle of constitutional rights ordinarily given to one charged with a "crime". More particularly; the constitutional strictures "as to modes of accusation and methods of trial" are not binding in contempt cases. *Ex parte Hudgings*, 249 U. S. 378, 383. This has been so; historically, because the courts have recognized that the power of summary punishment is essential for their self-preservation and so that they can "restrain acts tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power." *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 419.

"While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offense have been regarded as *sui generis* and not 'criminal prosecutions' within the Sixth Amendment or common understanding." *Myers* v. *United States*, 264 U. S. 95, 104-105. Thus, the fact that one accused of contempt does not receive a trial by jury does not violate that provision of the Sixth Amendment requiring a jury trial in "all criminal prosecutions." *Interstate Commerce*

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[4] In the *Warring* case, Mr. Chief Justice (then Judge) Vinson stated aptly: "'. . . we see no advantage in rehashing the discussions on whether criminal contempt is sui generis, offense, crime, or felony. Criminal contempts are criminal contempts; some of the procedural and substantive law applied to criminal contempts is as though they were crimes, and some of it is not.'"

Commission v. *Brimson*, 154 U. S. 447, 489; *In re Debs*, 158 U. S. 564, 594-596. By the same token, and because of the same considerations, a contempt is not a "crime" within the meaning of the Fifth Amendment. "In brief, a court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land * * *" (*id.* at 596), but rather is protecting the integrity of its processes and orders. "To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency" (*id.* at 595). See also *Eilenbecker* v. *Plymouth County*, 134 U. S. 31, 36; *Michaelson* v. *United States*, 266 U. S. 42, 65-67. This rationale is no less applicable to a grand jury than a petit jury. Yet, as Judge Hand points out in the opinion below (Pet. 28), the necessary consequence of adopting petitioner's view would be the anomaly that contempt proceedings, if the punishment may exceed a year's imprisonment, must be begun by a grand jury, although such proceedings need not be tried to a petit jury. The difficulties inherent in such a result—both logical and practical—demonstrate the lack of merit in the constitutional innovation suggested by petitioners.

Nor was the *sui generis* nature of contempt proceedings changed by the Federal Rules of Criminal Procedure. Petitioners rely heavily on Rule 7 of the Federal Rules of Criminal Procedure, which provides that an "offense" punishable by more than a year's imprisonment be prosecuted by indictment (Pet. 9). However, this Rule does not apply to contempts; for

Rule 42 specifically deals with contempts and the procedures to be followed with respect thereto. Rule 42 requires no indictment. When Rule 42 was adopted in 1944, there had been a long line of federal cases, not begun by indictment, imposing sentences of more than a year for contempt. No exception to Rule 42 was made to cover the more-than-one-year cases; that rule speaks broadly in its title of "Criminal Contempt." Had the drafters of Rule 42 intended to take the far-reaching step of either making criminal contempts subject to the requirement of an indictment or overruling a long line of cases, they would hardly have been so silent.

2. Petitioners argue that there is no evidence that they had knowledge of the existence of the order which they were convicted of disobeying (Pet. 17). As in *United States* v. *Hall*, 198 F. 2d (C. A. 2), certiorari denied, 345 U. S. 905, and *United States* v. *Thompson*, 214 F. 2d 545 (C. A. 2), certiorari denied, 348 U. S. 841, the conclusion is inescapable that petitioners were fully aware of the order requiring them to appear for execution of their sentences and wilfully disobeyed it. Equally applicable here is Judge Clark's statement in *Hall* that this "inference not only was well within the area permitted to a trier of facts, but was indeed one highly reasonable if not compelled." 198 F. 2d at 730.

On Friday afternoon, June 29, 1951, Mr. Sacher went from the United States Courthouse to Communist Party Headquarters where petitioners and the other *Dennis* defendants, all national officers of the

Communist Party, were gathered and were advised by him that their presence in court was required on Monday, July 2, 1951, when the proposed order was to be signed (G. Tr. 15-16; W. Tr. 18-19). Petitioners had previously applied for a stay of mandate of this Court, which was due to come down on June 29 and, when this was denied (G. Tr. 12; W. Tr. 15; 117 F. Supp. 685), counsel, on their behalf, then asked for an adjournment of petitioners' surrender until after July 4, so that they could be with their families over the holiday (G. Tr. 18). In addition, there is evidence that petitioners, after receiving notice from their attorney to surrender for commitment, left their regular places of residence and remained in hiding for a period of almost five years (G. Tr. 21-22; W. Tr. 26-27). There was further evidence that, several days before petitioners surrendered, they issued written statements to the press admittedly signed by them which conclusively established that they had remained in hiding in order to avoid serving the sentence to which they had been committed (G. Tr. 9; W. Tr. 21-25).[5] In view of the totality of this evidence, and since petitioners' disappearances were coincidental with the surrender order, the trial court was amply justified in finding that petitioners' flights were prompted by their knowledge of the surrender order.

The Second Circuit in the *Hall* case held, on almost identical facts, that the inference found by the trial

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[5] Green made similar statements in an oral interview with the press when he presented himself at the Court House (G. Tr. 27-32).

court that Hall knew of the order was highly reasonable; that the burden of proof beyond a reasonable doubt "constitutes an over-all admonition or warning, rather than a precise yardstick to be applied to each isolable segment of proof. * * * There can be little doubt but that a jury would have been permitted to make the rational inference made [by the court] below. We think that a court must not be restricted beyond a jury or compelled to remain blind to so clearly intentional a 'flouting of its command as was here shown". (198 F. 2d at 731). So here, the elements of the Government's proof, when considered in context, reveal a similar pattern of conduct.

3. Petitioners argue that federal district courts do not possess the power to punish a defendant for criminal contempt for disobedience of an order requiring him to surrender for execution of a sentence imposed on him (Pet. 19). This is substantially the same argument as was made in the petitions for writs of certiorari in the *Hall* and *Thompson* cases.

Petitioners do not deny that, under the literal language of 18 U. S. C. 401 (specifying as contempt of court the "Disobedience or resistance to its lawful writ, process, order, rule, decree, or command"), disobedience of any order, including an order for the surrender of a defendant for execution of sentence, would constitute contempt of court. Instead, they argue that, since outlawry was the punishment for absconding at common law, the contempt statute should not be interpreted as reaching disobedience of an order to surrender for commitment.

In their argument, petitioners, as did Hall and Thompson, overlook the fact that they all were convicted, not of "bail-jumping," but of wilful disobedience of the same specific order that each surrender himself from liberty on bail for execution of sentence. This is very different from the mere act of absconding while on bail. As held by the Second Circuit in *United States* v. *Hall*, 198 F. 2d 726, the offense of wilful disobedience clearly falls within the language of the statute, and there is no reason to carve an exception. Since the original theory of bail was that the prisoner was in the custody of his bail, rather than the sheriff, the act of absconding was escape from custody and obviously not violative of any specific court order. Cf. 2 Pollock and Maitland, *History of English Law* (1895 ed.), 580-584. For such an escape, his body was defaulted. Also recognized at common law was the penalty of outlawry, which might have been assessed against fugitives from justice, but which has long since fallen into obscurity. 3 Holdsworth, *History of English Law* (3d ed., 1923), 604-606.

Nevertheless, once a specific order to surrender has been properly entered and wilfully disobeyed, the case falls squarely within the plain language of 18 U. S. C. 401 (3). There is no reason why the statute should not be applied according to its terms. The order in this case to submit for execution of sentence is just as formal an order as an injunction order or a subpoena. Certainly a wilful disobedience of such an order is as much an affront to the dignity of the court as a wilful refusal to obey an injunc-

tion or appear pursuant to a subpoena. Petitioners state that prior to *Hall* there had never been a case in which a fugitive was prosecuted for contempt in a federal court. But where conduct clearly comes within the statutory definition of contempt, as in this case, it is immaterial that the contempt proceedings may be novel or unusual. See *State* v. *Albin*, 118 Ohio St. 527, 161 N. E. 792; *Silverman* v. *Seneca Realty Co.*, 154 Misc. 35, 276 N. Y. S. 466; *Dollard* v. *Koronsky*, 67 Misc. 90, 121 N. Y. S. 987, *affirmed*, 138 App. Div. 213, 123 N. Y. S. 11, *affirmed*, 199 N. Y. 558, 93 N. E. 1119. Cf. *Arizona Employers' Liability Cases*, 250 U. S. 400, 419.

Congress, in 1954, recognized the propriety of the use of the contempt power when the failure of one free on bail to surrender himself also involves contempt of court. In enacting a statute making bail-jumping a federal offense, Congress expressly provided that "Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt." 18 U. S. C. 3146.

4. Petitioners contend that the trial court abused its discretion in sentencing them to imprisonment for three years (Pet. 22).[*] In this respect, they attempt to draw a factual distinction between their situation and those of their co-fugitives Hall and Thompson. This attempted distinction is based on the fact that Hall and Thompson were apprehended

[*] This contention was not raised in the briefs in the court below. However, we understand that it did arise during oral argument.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 100

GILBERT GREEN AND HENRY WINSTON,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

JOHN J. ABT,
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New York 7, N. Y.
Attorney for Petitioners.

for certiorari was filed on April 9, 1957 and was granted on May 27, 1957. The Court has jurisdiction under 28 U. S. C. 1254.

Constitutional and Statutory Provisions Involved

The pertinent provisions of Amendment V of the Constitution, 18 U. S. C. 401, 18 U. S. C. 402 and Rule 7(a) of the Federal Rules of Criminal Procedure are set forth in Appendix A, *infra*.

Questions Presented

1. Whether there was evidence that petitioners had knowledge of the existence of the order for disobedience of which they were convicted of contempt.

2. Whether disobedience of an order requiring a convicted defendant to surrender for commitment is punishable as a contempt.

3. Whether criminal contempt may be punished by a prison sentence of more than one year.

4. Whether it was an abuse of discretion to sentence petitioners to imprisonment for three years.

Statement of the Case

The petitioners were separately tried and convicted of criminal contempt of an order of the District Court, entered July 2, 1951, requiring them to surrender for service of their sentences for conspiracy to violate the Smith Act, after affirmance of their convictions by this Court in *Dennis* v. *United States*, 341 U. S. 494. The contempt sentence of each petitioner was to imprisonment in a penitentiary for three years, consecutive upon his five year sentence in *Dennis*. (R. 72, 73.)

The two cases involve similar facts and identical questions of law.[2] They were initiated by affidavits of the United States Attorney upon which the District Court issued orders requiring petitioners to show cause why they should not be adjudged in contempt (R. 1-4). Each affidavit charged, on information and belief, that the accused "well knew of the outstanding order and decree of this Court," dated July 2, 1951, requiring him to surrender for commitment in the *Dennis* case, "and was in wilful and deliberate disobedience and resistance to said lawful order" (R. 3). Specifications of criminal contempt subsequently filed by the United States Attorney similarly charged each petitioner with "wilfully and knowingly disobeying and resisting" the order of July 2, 1951 (R. 4).

Each petitioner moved to dismiss the proceeding against him on the ground that disobedience of an order requiring a convicted defendant to surrender for commitment is not punishable as a contempt (R. 6). These motions were denied (*ibid.*) and the cases tried by the court without a jury. The evidence introduced by the Government established the following:[3]

In 1949, upon the convictions in *Dennis*, petitioners were sentenced to imprisonment for five years and were thereafter enlarged on bail pending appeal (R. 7, 44-56). On June 4, 1951, this Court affirmed their convictions (R. 8).

On June 28, 1951, the United States Attorney served petitioners' counsel with a notice that on July 2 he would

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[2] There are no material differences in the proceedings in the two cases which were consolidated in the Court of Appeals and disposed of in a single opinion (R. 74). The printed record contains (1) all of the pertinent proceedings in the *Green* case and (2) pertinent portions of the proceedings in the *Winston* case which are not duplicated in the *Green* record. Record citations are confined to the proceedings in the *Green* case except where differences in the *Winston* record are referred to.

[3] Petitioners offered no evidence.

whereas petitioners "voluntarily" submitted themselves to the authority of the court. But petitioners make no mention of the further fact that for nearly five years they had flouted the authority of the court before they decided to surrender themselves. The only reasonable distinction to be found in these facts is that the petitioners were more adept than their co-fugitives in evading the long arm of the law, as evidenced by their remaining at large for such a greater length of time.[7]

Inasmuch as Hall and Thompson received as long or longer sentences for a shorter period of disobedience, there could hardly be an abuse of discretion by the lower court in sentencing the petitioners to three years imprisonment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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Attorneys.

MAY 1957.

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[7] Hall remained at large for a period of three months and received a sentence of three years imprisonment. Thompson evaded capture for nearly twenty-six months and was imprisoned for four years.

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